BEFORE THE

ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
MOBILEMEDIA CORPORATION, et al.	)	**WT Docket No. 97-115**
	)	
Applicant for Authorizations and Licensee of Certain Stations in Various Services	)	

To: The Commission

PETITION FOR LIMITED WAIVER AND FOR EXPEDITED QUALIFICATIONS FINDING

HELLMAN & FRIEDMAN
CAPITAL PARTNERS II, L.P.

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July 23, 1997

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SUMMARY

Hellman & Friedman Capital Partners II, L.P. ("HFCP II") hereby seeks a waiver of Paragraph 18 of the Commission's Order of June 6, 1997 which stayed, on Second Thursday grounds, a pending qualifications hearing involving MobileMedia Corporation ("MobileMedia"). HFCP II herein asks the Commission to find four individuals affiliated with HFCP II (the "H&F Principals") qualified to hold non-MobileMedia licenses.

Grant of the requested waiver is fully justified. The specific mechanism envisioned by Paragraph 18 — a preliminary qualifications finding and recommendation by a Bureau processing a particular application in which an H&F Principal has an attributable interest — is inappropriate and inefficient in the case of Hellman & Friedman, because Hellman & Friedman is associated with multiple companies that are prosecuting applications before different Bureaus (e.g., Wireless, Cable Services, International) at any given time.

Direct Commission resolution of the qualifications of the H&F Principals is entirely appropriate given the ample investigative record in this proceeding and the Commission's reservation to itself of the right to make key MobileMedia-related decisions in the first instance. That ample record uniformly and compellingly demonstrates that none of the H&F Principals participated in, orchestrated, approved, or had any knowledge of the wrongdoing which was voluntarily disclosed to the Commission by MobileMedia in an October 15, 1996 Counsel's Report. Upon learning of the wrongdoing, the H&F Principals, in their capacities as MobileMedia Board members, immediately authorized a thorough internal investigation, fully cooperated with the Wireless Bureau's investigation, and authorized the implementation of a comprehensive compliance program.

With respect to the so-called "14(b) Issue" in the MobileMedia proceeding, MobileMedia's previously filed Motion to Delete that issue provides an ample basis for the Commission to conclude that the issue poses no obstacle to finding the H&F Principals fully qualified to hold other Commission licenses. That Motion, supported by four Declarations of MobileMedia attorneys, demonstrates, among other things, that the issue is largely premised on a classic case of mistaken identity and is totally inconsistent with the clear, central purpose of the Counsel's Report — to disclose known facts about the wrongdoing in painful, complete detail.

Substantial public policy considerations also support grant of the requested relief. First, the Commission has long recognized that voluntary disclosure of transgressions, such as the H&F Principals' disclosure here, provides compelling evidence of a licensee's basic fitness to hold licenses. Second, Hellman & Friedman and its institutional investors (e.g., the California, New York and Virginia public employee retirement systems, the pension funds of AT&T, IBM and NYNEX, the Stanford and Yale endowments, and the Ford Foundation) have already paid a high price in the MobileMedia context. The Commission should take steps to ensure that other companies will not suffer unnecessary, unwarranted collateral damage, particularly in these times of scarce capital for industries such as the wireless industry.

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Hellman & Friedman Capital Partners II, L.P. ("HFCP II"), by its attorneys and pursuant to Sections 1.3 and 1.41 of the Commission's Rules, hereby seeks a waiver of Paragraph 18 of the Commission's Order, FCC 97-197, released June 6, 1997 in WT Docket No. 97-115 ("Order") to allow HFCP II to make a showing directly to the Commission that four individuals affiliated with HFCP II are fully qualified to hold licenses issued by the Federal Communications Commission ("FCC" or "Commission"). HFCP II also requests that the Commission make such a finding on an expedited basis. In support whereof, the following is shown.

I. BACKGROUND

The Order stayed for a period of ten months a hearing into the qualifications of MobileMedia Corporation ("MobileMedia") to hold paging licenses. See MobileMedia Corporation, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124, released April 8, 1977 ("HDO"). The stay was issued at the request of MobileMedia (supported by the FCC's Wireless Telecommunications Bureau ("Wireless Bureau") as well as MobileMedia's secured and unsecured creditors),[1/] in order to allow MobileMedia time to resolve a pending proceeding before the United States Bankruptcy Court in a manner consistent with Second Thursday Corporation, 22 F.C.C.2d 515 (1970), recon. granted, 25 F.C.C.2d 112 (1970).[2/] HFCP II had also supported grant of the stay in April 29, 1997 Comments filed with presiding Administrative Law Judge Joseph Chachkin, and HFCP II reiterates that support here. The hearing had been designated in April 1997 to resolve qualifications issues resulting from MobileMedia's voluntary disclosure in September-October 1996 of a series of violations of Commission rules involving the construction of paging facilities, and a subsequent investigation conducted by the Wireless Bureau into the admitted wrongdoing. In its Order, the Commission recognized the harm that could befall innocent creditors in the absence of a stay. At the same time, the Commission decided in Paragraph 18 of the Order both to immediately identify "potential" wrongdoers in the MobileMedia hearing by means of a

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1/ See Order at ¶¶ 8-10.

2/ Under Second Thursday, in order to protect innocent creditors, the Commission will allow a licensee involved in bankruptcy proceedings to avoid an FCC qualifications hearing, so long as alleged wrongdoers will not benefit from such relief or any such benefit is minimal and outweighed by the overall public interest considerations.

comprehensive list of individuals to be prepared and disseminated by the Wireless Bureau and to provide a mechanism by which the qualifications of certain listed individuals could be resolved, if necessary, during the pendency of the stay. The Commission directed all Bureaus processing applications in which a listed individual holds an "attributable" interest to make a "recommendation" to the Commission as to the basic qualifications of that individual, with the ultimate qualifications resolution to be made by the Commission itself. The procedures by which the affected individual was to proffer information relevant to his or her qualifications were left undefined.

On June 25, 1997, pursuant to Paragraph 18 of the Order, the Wireless Bureau issued a "Revised and Corrected List" of former and current officers, directors and senior managers of MobileMedia Corporation and subsidiaries. The listed individuals included F. Warren Hellman, Tully M. Friedman, John L. Bunce, Jr., and Mitchell R. Cohen, all principals of HFCP II ("H&F Principals").[3/] On July 3, 1997, Western Wireless Corporation ("Western"), a publicly traded cellular telephone/PCS/paging company in which certain of the H&F Principals hold attributable interests, submitted an "Emergency Petition for Limited Reconsideration or Clarification" ("Emergency Petition") seeking to change the "attribution" standard set forth in Paragraph 18 to one of "control." HFCP II fully supports expedited grant of the limited relief sought by Western, which it believes to be entirely consistent with the waiver and qualifications

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3/ The list mistakenly omitted the "Jr." from Mr. Bunce's name. Just prior to release of the HDO, Tully M. Friedman was an active member of Hellman & Friedman (see Section II infra). He resigned that active participation for reasons unrelated to MobileMedia as of March 31, 1997, to begin Tully M. Friedman & Co., LLC, although he still has a financial stake in various Hellman & Friedman investments, including HFCP II. He resigned from the MobileMedia Board of Directors effective March 11, 1997. Attachment 3 hereto.

finding sought herein.[4/] Western's request has been supported by Falcon Holding Group, L.P. in July 14, 1997 Comments and other parties have also sought relief from the Order. See Public Notice, Report No. 2210, released July 10, 1997.[5/]

II. IN LIGHT OF THE DIVERSE INVESTMENTS OF HELLMAN & FRIEDMAN, THE FULL COMMISSION IS THE MOST APPROPRIATE FORUM FOR DIRECT RESOLUTION OF THE QUALIFICATIONS OF THE H&F PRINCIPALS

Hellman & Friedman is an investment firm based in San Francisco, California and founded in 1984. Attachment 2 hereto. As set forth in Attachment 1 hereto, the Declaration of Mitchell R. Cohen, Hellman & Friedman pools substantial amounts of capital from large institutional investors and invests those funds in carefully selected, diverse companies. Hellman & Friedman enjoys a reputation for excellence and integrity in the investment community and over

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4/ HFCP II believes the public interest would clearly be served by prompt grant of Western's amply supported request for relief, particularly given the exigencies of its proposed acquisition of Triad Cellular Corporation and its affiliates. At the same time, HFCP II believes that the public interest would also clearly be furthered by Commission resolution of the qualifications of the H&F Principals, given their interests in multiple Commission authorizations and applications (see July 11, 1997 Letter from undersigned counsel to Nancy J. Victory, Esq., submitted to the Wireless Bureau on the same date), and given the inequity, under all the facts and circumstances outlined in this Petition, of allowing a qualifications cloud to hang over them. HFCP II does not believe it necessary for the Commission to act on this Petition prior to or contemporaneously with granting Western's requested relief. In HFCP II's view, HFCP II's and Western's petitions can be processed on separate tracks.

5/ On July 21, 1997, MobileMedia filed "Supplemental Comments" proposing a procedure for individuals to seek to remove their names from the "Revised and Corrected List" where those individuals have no other such procedure under Paragraph 18 of the Order. Because HFCP II believes that Paragraph 18 (with the limited waiver sought herein to allow direct Commission consideration of the H&F Principals' qualifications) provides it with an avenue for relief, the procedure proposed by MobileMedia for individuals without other avenues is not inconsistent with this Petition.

the course of the last ten years has created three separate investment funds — Hellman & Friedman Capital Partners ("HFCP I") and two affiliated limited partnerships (consisting of committed capital of approximately $165 million); HFCP II and two affiliated limited partnerships (with approximately $875 million in committed capital) and Hellman & Friedman Capital Partners III, L.P. and two affiliated limited partnerships ("HFCP III") (approximately $1.5 billion in committed capital). HFCP I, II, and III share some, but not all of the same institutional investors. Examples of the distinguished investors who have entrusted significant funds to Hellman & Friedman include the retirement systems of California, New York, and Virginia, the pension funds of AT&T, IBM, and NYNEX; the endowments of Yale and Stanford Universities; and the Ford Foundation. Attachment 1 hereto, at 1.

Hellman & Friedman typically seeks investment opportunities which are greater than $50 million in businesses with talented management teams and attractive operating fundamentals. Id. Hellman & Friedman normally oversees its investments through participation on a parent company's Board of Directors. Given the breadth of its investments and given its basic investment philosophy, Hellman & Friedman is typically not involved in the day-to-day management of the companies in which it has invested. Id. In keeping with its varied portfolios, the H&F Principals have diverse and extensive business backgrounds:

- F. Warren Hellman, 62, graduated from the University of California at Berkeley in 1955 and the Harvard Business School in 1959. In addition to MobileMedia, he is currently a Director of, among other companies, Young and Rubicam, Inc., Levi Strauss & Co., APL Ltd., and Franklin Resources, Inc., and a number of private and venture capital-backed companies. Mr. Hellman is a trustee of The Brookings Institution and The San Francisco Foundation, the Chairman of the Committee on JOBS, and a member of the Board of Directors of Children Now and the University of California Business School Advisory Committee. Attachment 2 hereto.

- Tully M. Friedman, 55, graduated from Stanford University in 1962 and Harvard Law School in 1965. Mr. Friedman is on the Board of Directors of APL Ltd., Levi Strauss & Co., Mattel, Inc. and McKesson Corporation. Mr. Friedman is a member of the Executive Committee and a Trustee of the American Enterprise Institute and a Director of the Stanford Management Company. He is also a former President of the San Francisco Opera Association and a former Chairman of Mount Zion Hospital and Medical Center. Attachment 3 hereto.

- John L. Bunce, Jr., 38, graduated from Stanford University in 1980 and the Harvard Business School in 1984. In addition to MobileMedia, Mr. Bunce is a Director of, among other companies, Young & Rubicam, Inc., Western Wireless Corporation, and Falcon International Communications LLC, and a member of the Board of Representatives of Falcon Holding Group, L.P. Attachment 4 hereto.

- Mitchell R. Cohen, 33, graduated from the McIntire School of Commerce at the University of Virginia in 1986 and joined H&F in 1989 after working as an Associate in the Merchant Banking Department and the Office of the Chairman at Shearson Lehman Hutton Inc. Mr. Cohen is a Director of Advanstar Communications, Western Wireless Corporation, and MobileMedia. Attachment 1 hereto, at 1.

Wide-ranging industries in which the three Hellman & Friedman funds have invested include media, entertainment, money management, insurance, and basic infrastructure in developing countries, as well as telecommunications. With respect to telecommunications, in addition to its sizable investment in MobileMedia, discussed in Section V, infra, HFCP II and affiliates have over time invested approximately $137.5 million in Western Wireless Corporation ("Western"), $75 million of which was used to fund Western's PCS auction commitments, and HFCP I and II have over time invested nearly $83 million in Falcon Holding Group, L.P. and affiliated companies ("Falcon"), a cable television multiple systems operator. A fourth communications investment is the $345,000 invested to date by HFCP III and affiliates in NetSat 28 Company, L.L.C. ("NetSet 28"), a start-up Ka-band satellite company. In addition, HFCP III has entered into a joint venture

with Cook Inlet Region to form Cook Inlet Communications Ventures looking toward the acquisition of media and communications-related entities. Attachment 1 hereto at 1.

The scope of these various communications investments has led HFCP II to seek a limited waiver of Paragraph 18 of the Order. The entities other than MobileMedia in which Hellman & Friedman has invested file many applications with different Bureaus — for example, the Wireless Bureau (Western); Cable Services Bureau (Falcon); and International Bureau (NetSat 28). As a consequence, the procedure envisioned by Paragraph 18 — Commission resolution of a listed individual's qualifications after a preliminary finding and recommendation from a Bureau — appears to be arbitrary and inefficient in the case of the H&F Principals. There is no reason to favor one Bureau over another with the preliminary finding/recommendation obligation, at least where, as here, the ultimate resolution must be made by the Commission. There is also no reason to potentially burden all three Bureaus simultaneously with an identical obligation. A much more logical and efficient procedure is for HFCP II to make its qualifications showing to the Commission itself, with the various Bureaus free to comment. HFCP II accordingly seeks such relief herein.

The requested waiver is particularly appropriate in the context of the MobileMedia matter, where the Commission has scrupulously reserved to itself the right to resolve, in the first instance, issues of critical importance. See, e.g., HDO at Paragraphs 15(b) (reserving to the Commission the right to resolve in the first instance all petitions to intervene, all motions to enlarge, change, or delete issues, and all motions for summary decision) and 15(e) (reserving to the Commission the right to reach conclusions of law in the first instance). Requiring one randomly selected Bureau to make a preliminary finding/recommendation, rather than allowing all affected Bureaus to comment on a showing made directly to the Commission, would unwisely

elevate form over substance. It would also leave in place an unnecessary, extra processing layer that will undoubtedly lengthen the decisional process. Expedition, not delay, would best serve the public interest here.

III. THE EXTENSIVE RECORD COMPILED TO DATE COMPELLINGLY DEMONSTRATES THAT THE H&F PRINCIPALS ARE QUALIFIED TO HOLD AUTHORIZATIONS ISSUED BY THE FCC

A. The Commission Has An Adequate Record To Support The Qualifications Finding Requested Herein

HFCP II's request for favorable resolution of the basic qualifications of the H&F Principals is being made against an unusually well-developed factual background. Unlike many Commission hearings, which are designated to resolve conflicting allegations of fact made by private parties, the MobileMedia matter was set for hearing only after MobileMedia had voluntarily disclosed the wrongdoing and the Wireless Bureau had conducted a wide-ranging investigation into the matter over the course of some six months. That investigation involved, inter alia, the production of thousands of pages of documents, the depositions under oath of a number of individuals, including all four of the H&F Principals, and ongoing give-and-take between the Bureau and MobileMedia counsel. In addition, with respect to the issue set forth in Paragraph 14(b) of the HDO, MobileMedia has already set forth, in a Motion to Delete that issue, the fully documented factual predicate for a conclusion that the 14(b) issue poses no obstacle to finding the H&F Principals fully qualified to hold Commission licenses. The scope of the information already produced therefore gives the Commission an unusually broad perspective on

the instant request, and an extensive factual background against which to make the requested finding of basic qualifications.

B. None Of The H&F Principals Participated In, Orchestrated, Approved, Condoned, Or Had Knowledge Of: The Filing Of False FCC Forms 489 And "40-Mile" Applications; The Unauthorized Construction and Operation Of Paging Facilities; Or The Late Filing Of FCC Forms 489

The essential purpose of the hearing designated by the HDO is to reliably determine who among MobileMedia's officers, directors, and senior management was involved in or had knowledge of the extensive wrongdoing that was voluntarily disclosed to the Commission by MobileMedia in September/October 1996. The disclosed wrongdoing encompassed: (1) the filing of several hundred FCC Form 489 applications which certified that paging facilities had been constructed, when that was not true; (2) the filing of many so-called "40-mile" applications to construct new paging facilities, which were based on the false predicate that paging facilities had already been constructed within 40 miles of the proposed new facilities; (3) the construction and operation of paging facilities after the underlying authorizations had already expired; and (4) the filing of FCC Forms 489 more than 15 days after particular paging facilities' commencement of service. See Paragraphs 14(a), (c), and (d) of the HDO (collectively the "Disclosed Wrongdoing").

The extensive record developed to date clearly establishes that the H&F Principals did not participate in, orchestrate, approve, condone, or have prior knowledge of any of the Disclosed Wrongdoing.[6/] Indeed, none of the H&F Principals learned of the Disclosed

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6/ For purposes of this Petition, it is not necessary to address the broader issue of which

(continued...)

Wrongdoing until sometime on or after August 19, 1996, when MobileMedia's then interim Chief Executive Officer David Bayer first brought it to the attention of H&F Principals. Upon learning of the Disclosed Wrongdoing, the H&F Principals acted in the most responsible fashion, consistent with their responsibilities as Directors of a Commission licensee.[7/] They agreed to direct counsel to immediately establish through investigation the scope of the wrongdoing, they authorized the full disclosure of the discovered facts to the Commission, they cooperated fully in the ensuing Staff investigation, and they authorized immediate, comprehensive remedial measures.

The record compiled to date uniformly and conclusively supports the proposition that the H&F Principals did not participate in and had no prior knowledge of the Disclosed Wrongdoing. First, the October 15, 1996 Report jointly prepared and submitted to the Commission by the distinguished law firms of Latham & Watkins and Wiley, Rein & Fielding ("Counsel's Report"), after those firms' extensive investigation into the underlying facts,[8/]

[6/](...continued)
MobileMedia principals did participate in or have prior knowledge of the Disclosed Wrongdoing. The only issues addressed herein relate to the H&F Principals.

[7/] The fact that the H&F Principals had no prior knowledge of the Disclosed Wrongdoing is also consistent with their roles as Directors. The Board of Directors oversees MobileMedia, but necessarily relies on company officers and counsel to carry on the day-to-day affairs. See Delaware General Corporation Law at § 141(e) ("A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of his duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation").

[8/] See Counsel's Report at 4-7 for a description of the broad scope of counsel's investigation of the underlying facts.

concluded that no Board member, including the H&F Principals, had prior knowledge of the Disclosed Wrongdoing:

> In July, 1996, the Company terminated the employment of its Chief Executive Officer and Chief Operating Officer for reasons of poor operating performance. The Form 489 filing problem was not then known to the Board of Directors, and the terminations were based on other grounds. David Bayer, a member of the Company's Board of Directors and a person with substantial experience in the mobile communications industry, agreed to serve as the new Chief Executive Officer on an interim basis.
>
> On August 19, 1996, Regulatory Counsel sent a memorandum to the Company's General Counsel, informing him that the number of non-operational stations for which a Form 489 had been filed in the first quarter of 1996 could be as large as 128. According to the General Counsel, this was his first indication that the problem was potentially so large and had gone so long without being "corrected." Against the wishes of Regulatory Counsel, the General Counsel caused the memorandum to be elevated immediately to the attention of the acting Chief Executive Officer. Mr. Bayer held preliminary discussions with the General Counsel, alerted his fellow members of the Board to the problem, and, at the Board's direction, instructed the Company's outside counsel, Latham & Watkins, to investigate the issue immediately, quantify the problem, and recommend appropriate disclosure and remedial action. The Company later retained Wiley, Rein & Fielding to assist in these efforts.

Counsel's Report, at 20-21 (emphasis added; footnote omitted). The Latham and Wiley firms reiterated this conclusion in a January 31, 1997 report submitted to the Commission on the MobileMedia matter:

> The testimony, however, is plain and uncontradicted on the following basic propositions: (1) no member of the Board of Directors . . . had any knowledge of the improper filings before August 19, 1996 . . . .

Latham/Wiley January 31, 1997 Report, at 2 (emphasis in original).

Similarly, each of the H&F Principals was deposed by Commission personnel during the Wireless Bureau's six month investigation into the MobileMedia matter. All of that sworn testimony is entirely consistent on the essential question of whether the H&F Principals knew of the Disclosed Wrongdoing before August 19, 1996. The deposition transcripts of

Hellman, Friedman, Bunce, and Cohen make clear that prior to Bayer notifying H&F Principals on or after August 19, 1996 of the problems with the filing of FCC Forms 489, the H&F Principals had no knowledge of, much less participation, in the wrongdoing. For the Commission's convenience, the H&F Principals all attest to that same fact in the Declarations which are Attachments 1-4 hereto. Furthermore, the H&F Principals are aware of no testimonial or documentary evidence from any source that would demonstrate that the H&F Principals had any prior knowledge of the Disclosed Wrongdoing. See Counsel's Report at 16, note 13.

C. Upon Learning Of The Wrongdoing, The H&F Principals Immediately Authorized A Thorough Internal Investigation, Fully Cooperated With The Wireless Bureau's Investigation, And Authorized The Implementation Of A Comprehensive Compliance Program

The record evidence also establishes that, upon learning of the problem with the filing of false FCC Forms 489, the H&F Principals and other members of the MobileMedia Board acted immediately to authorize a complete investigation of the underlying facts as well as voluntary and complete disclosure of the discovered facts to the FCC. Indeed, the Counsel's Report shows that within a few days of first learning of the problem (i.e., by August 23, 1996), attorneys from Latham & Watkins were already interviewing a key protagonist in the wrongdoing, and by September 4, 1996, counsel had already verbally disclosed the problem, in its then-known scope, to the Chief of the Wireless Bureau. November 20, 1996 Letter from Wiley/Latham to the Wireless Telecommunications Bureau at Appendix A, page 13; Counsel's Report at 7-8.

In addition, the H&F Principals offered their full cooperation to the Wireless Bureau during the Bureau's investigation. This entailed, among other things, making themselves

available for deposition, and, as Board Members, authorizing the production of thousands of pages of documents. At the depositions, attorney/client privilege was waived and not a single objection to a question was lodged by an H&F Principal or MobileMedia counsel in attendance. In other words, the H&F Principals did everything they could to ensure that a full record was established concerning the Disclosed Wrongdoing.

Finally, the H&F Principals swiftly moved, together with other MobileMedia Directors, to retain Ralph Haller, a former Commission Bureau Chief, to devise a comprehensive compliance program for MobileMedia. That program requires, among other things, verification of construction before Forms 489 are filed. The H&F Principals have therefore taken decisive steps to prevent a recurrence of the problems uncovered in August 1996. See October 31, 1996 Memorandum from Wiley/Latham to the Wireless Telecommunications Bureau, at 3-4.

IV. THE ISSUE DESIGNATED IN PARAGRAPH 14(b) OF THE HDO POSES NO OBSTACLE TO FINDING THE H&F PRINCIPALS QUALIFIED TO HOLD OTHER COMMISSION LICENSES

Paragraph 14(b) of the HDO designated the following issue (the "14(b) Issue") for resolution at hearing:

> (b) to determine the facts and circumstances surrounding MobileMedia's submission of its October 15, 1996, Report to the Bureau (including, but not limited to, the identity of all persons who participated in the preparation of the Report and the nature and extent of their participation, including their intent) and whether MobileMedia knowingly made false statements, engaged in misrepresentations, lacked candor, or willfully or repeatedly violated Section 1.17 of the Commission's Rules with regard to the submission of the October 15, 1996, Report to the Bureau.

Unlike the issues designated in Paragraphs 14(a), (c), and (d) of the HDO and addressed in Section III, supra, this issue relates to the post-August 19, 1996 period, after the H&F Principals

had become aware of the Disclosed Wrongdoing. In essence, it seeks to determine whether the Counsel's Report was less than fully candid with respect to certain disclosures concerning MobileMedia's Chief Technology Officer and Vice President Mark Witsaman.

Again, the Commission has the advantage of evaluating this particular issue as it relates to the H&F Principals against the background of a well-developed factual record. On May 21, 1997, MobileMedia filed a 25-page Motion to Delete Issue 14(b), a copy of which comprises Attachment 5 hereto. The Motion to Delete is supported by the Declarations Under Penalty of Perjury of four attorneys involved in the preparation of the Counsel's Report (Eric L. Bernthal, Robert L. Pettit, Richard E. Wiley and Christopher D. Cerf), and presents in compelling detail multiple reasons for deleting the 14(b) Issue. For present purposes, however, there is no need to resolve the Motion to Delete and HFCP II is not asking the Commission to do so. Rather, the Motion to Delete is relevant in that it provides sufficient perspective on the underlying facts to demonstrate that the issue does not under any set of circumstances rise to a level that would preclude the H&F Principals from holding other, non-MobileMedia licenses.

Given the comprehensive nature of the Motion to Delete, there is no need to repeat it here. However, HFCP II believes that it is important and worthwhile to summarize its essential points:

- The necessary underlying premise of the 14(b) Issue — that there may have been a deliberate attempt by MobileMedia and its counsel to deceive or mislead the Commission on a subsidiary issue relating to a single individual — is absolutely inconsistent with the fundamental approach of MobileMedia's Directors and its counsel once the problem was discovered. Those Directors and counsel voluntarily disclosed the false Form 489 filings in painful detail, at great cost to MobileMedia (and Hellman & Friedman and its institutional

investors). There was no motive whatsoever to carve out special, deceptive treatment for one individual.

• The HDO's apparent assumption that the Counsel's Report had misleadingly identified Mark Witsaman as a mere employee (rather than an officer) of MobileMedia proceeds from a classic case of mistaken identity. As the Declaration of attorney Christopher Cerf (attached to the Motion to Delete) makes clear, the "employee" mentioned at that point of the Counsel's Report was Todd Wheeler, not Witsaman. To protect identities, names were not used in the text of the Counsel's Report and Wheeler, like Witsaman, was a former Bell South employee, which helps explain how the Commission could have mistaken one person for the other.

• Conclusive proof that MobileMedia was not trying to conceal Witsaman's knowledge of the false filing scheme or his status as a MobileMedia officer can be derived from a reading of the Counsel's Report in its totality. Witsaman was identified multiple times by name in the Report's exhibits, and his knowledge of the false filing scheme was repeatedly disclosed. Furthermore, MobileMedia even submitted to the FCC in November 1996 a September 18, 1996 internal counsel's memo that contained an entire paragraph concerning the "Role of Chief Technology Officer," i.e., Witsaman, in the false filing scheme.[9/]

• Read in the context of the entire Counsel's Report, statements that MobileMedia had "terminated the employment of senior management personnel," that "none of the members of senior management involved in the derelictions — either directly or as a matter of

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9/ "[W]hen accurate information...supplied by a party is a matter of open Commission record, 'an intent to categorically misrepresent... is difficult to find.' " Intercontinental Radio, Inc., 98 F.C.C. 2d 608, 639 (Rev. Bd. 1984) (citations omitted).

responsibility — remain employed by the Company" and that "other lower-level employees should not be disciplined simply for their awareness of [the false filings]" reflect nothing more than MobileMedia's good faith conclusion that Regulatory Counsel (who had signed the false applications) and everyone culpable in the Company's chain of command above him had either left the Company for other reasons or been terminated. Because MobileMedia had: quite explicitly shared with the Commission its reasons for retaining Witsaman in its employ despite his knowledge of the false filing scheme; specifically invited the Bureau to reflect on the Company's decision to retain Witsaman; and offered in writing from the very outset to assist the Wireless Bureau by clarifying any facts set forth in the Counsel's Report, none of these isolated, out-of-context statements can support a theory of deliberate lack of candor or misrepresentations.[10/]

For all of these reasons, the Commission has an ample basis to conclude that the 14(b) Issue is no impediment to the H&F Principals' qualifications to hold other licenses. The evidence demands a conclusion that a report from which the H&F Principals were, after all, "once removed" (i.e., they did not write the Report), does not come close to demonstrating an intent to deceive anyone on the part of the H&F Principals. In their attached Declarations, all of the H&F Principals attest that they are not aware of any intention on the part of MobileMedia or its counsel to misrepresent facts, mislead, or deceive the Commission in the Counsel's Report. Indeed, the sole purpose of the Counsel's Report, read fairly and in its entirety, was to disclose all known facts, not to deceive in any way. As the Motion to Delete summarizes:

10/ A determination of misrepresentation or lack of candor requires both that there be an actual misstatement of fact or omission of a relevant fact and that the misrepresentation be intended to deceive the Commission. Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1221-22 (D.C. Cir. 1994). See also HDO at ¶7 ("the sine qua non for a finding of disqualifying misrepresentation or lack of candor is an intent to deceive the Commission").

> All of these reports and discussions reflected the decision made by the Company as soon as the false filings were discovered that full disclosure would be made to the Commission of all relevant facts. See Bernthal Declaration. When Wiley, Rein & Fielding joined the investigation, that firm concurred completely with that decision. See attached Declaration of Richard E. Wiley. Having embarked on that course, the Company and every attorney involved in the investigation were acutely aware that the only acceptable way to respond to derelictions as substantial as those discovered here would be to prepare and present to the Commission a complete and absolutely candid report stating what had happened, how it had happened, who had been responsible, and the measures the Company would take to insure that similar derelictions could never happen again. See the attached Wiley, Pettit and Bernthal Declarations. It is patently unreasonable for the HDO to suggest that the experienced and highly reputable attorneys involved in this process would abandon this purpose and deliberately attempt to mislead the Commission on a peripheral issue involving a single employee.

Motion to Delete at 23-24. Under these circumstances, the Commission can readily conclude that the 14(b) Issue is no impediment to the H&F Principals' qualifications to hold authorizations issued by the Commission.

V. SUBSTANTIAL PUBLIC POLICY CONSIDERATIONS SUPPORT GRANT OF THE RELIEF REQUESTED HEREIN

The facts reviewed above present a compelling case for an FCC finding that the H&F Principals possess the basic qualifications to hold other Commission licenses. In addition to this strong factual foundation, several key public policy considerations support grant of the requested relief. First, the Commission has historically found that a licensee's voluntary disclosure of violations of law bears directly on that licensee's basic fitness to hold Commission licenses.[11/] The FCC's regulatory responsibilities are so vast that the agency is critically

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11/ Pass Word, Inc., 76 F.C.C.2d 465, 517 (1980), aff'd sub. nom. Pass Word, Inc. v. FCC, (continued...)

dependent on the absolute candor of its licensees, particularly those who find themselves in regulatory difficulty. Limited resources simply do not allow the Commission to actively police its multitudinous licensees. Perhaps for that reason, the Commission has, to undersigned counsel's knowledge, never found a licensee who has voluntarily disclosed wrongdoing to be basically unfit to hold a license.[12/] That fact is in turn based on an inherent recognition that imposing the regulatory equivalent of "capital punishment" on a voluntary discloser, particularly where that individual did not participate in or have prior knowledge of the wrongdoing, could effectively remove the incentives for the disclosure itself.

[11/](...continued)

673 F.2d 1363 (D.C. Cir. 1982) ("[m]itigation exists where the licensee brings its derelictions to the attention of the Commission itself, not where cooperation is forthcoming only after it is clear that further concealment is no longer feasible"). See also Deer Lodge Broadcasting, Inc., 86 F.C.C.2d 1066, 1097 (1981) (station renewal granted where knowing false written statements were "voluntarily corrected [only] when the [owners] took the witness stand in this hearing"). Even in an egregious situation, involving, unlike this case, recantation (Janus Broadcasting Co., 78 F.C.C.2d 788, 790-92 (1980)), license renewal was granted. Although the station owners in that case had lied to Commission investigators — "the misrepresentation was substantially mitigated by the later recantation. On this point, we believe that where, as here, there has been misrepresentation and recantation, our concern is not limited to the need to require truthfulness and candor on the part of licensees. We must also consider whether the recantation indicates that the Commission can trust the licensee in the future. Furthermore, recantation by a licensee serves the public interest by permitting the Commission to get to the truth without resort to other means."

[12/] For example, in Southland Holdings, Inc., 9 FCC Rcd 1961, 1961-62 (Com. Car. Bur. 1994), the Bureau found "no substantial and material questions of fact regarding [the licensee's] basic qualifications to be a licensee" and entered a consent decree with the licensee despite the fact that: (1) the licensee had failed to construct more than 75 percent of its system as reported to the FCC; (2) the licensee " 'lacked candor and . . . misrepresented in its FCC Form 489 filings that it was commencing service upon filing of the form;' " (3) the licensee had no customers when it filed the false Forms 489; and (4) the wrongdoing was uncovered during the course of a Commission investigation.

Despite the magnitude of the Disclosed Wrongdoing in this case, these essential principles remain very pertinent here. That is because of one key parallel fact — the disclosure of the wrongdoing was itself massive. It is an important truism: The magnitude of the disclosure mirrors the magnitude of the wrongdoing. Phrased another way, to the extent the scope of the wrongdoing is "unprecedented" (in the words of HDO), so is the scope of the disclosure.

Furthermore, the spirit of disclosure and cooperation that animated the H&F Principals in voluntarily bringing the wrongdoing to the Commission's attention remains in place today. For example, although HFCP II believes that this Petition provides the Commission with ample justification for finding the H&F Principals fully qualified, these four individuals stand ready to supply the Commission with supplemental filings or information within their control, if the Commission concludes that such supplemental material is necessary to such a finding.

A separate and independent public policy consideration supporting this Petition is that the unfortunate circumstances of the MobileMedia situation have already exacted a very high price from the H&F Principals and Hellman & Friedman. This is decidedly not a case in which grant of the relief requested herein can reasonably be interpreted as a "soft" approach to enforcement. Hellman & Friedman's institutional investors (e.g., the California Public Employees Retirement System, and the pension funds of AT&T and IBM), have already suffered huge losses with respect to the MobileMedia investment. Specifically, HFCP II and its affiliates have invested over $169,000,000 in MobileMedia and under the current bankruptcy scenario, Hellman & Friedman's institutional investors have no reasonable prospect of recouping that massive MobileMedia investment.

Because of the taint resulting from the MobileMedia problems, Hellman & Friedman has also been losing opportunities to invest in communications ventures,

opportunities which are harder to quantify but nonetheless very real. Until that taint is removed, new FCC-regulated investment opportunities will remain closed to them and their institutional investors. In the same way, communications entities have lost access to the equity capital which Hellman & Friedman can provide. Furthermore, the Commission must consider the "ripple effect" which attends a major proceeding like this one. To the extent comparable equity sources see Hellman & Friedman treated fairly and rationally by the Commission under admittedly difficult circumstances, they are reassured. To the extent Hellman & Friedman is treated inequitably and irrationally, made to endure collateral damage even though they played no role in the wrongdoing and even after they have voluntarily disclosed that wrongdoing and fully cooperated in the ensuing agency investigation, those comparable equity sources may be chilled.

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Based on the foregoing, the Commission has an adequate, indeed ample, factual and public policy basis on which to find that the H&F Principals are fully qualified to hold FCC licenses. The facts set out above are undisputed in all material respects and, for that reason, the Commission should exercise its considerable discretion and conclude that no hearing is required at this time on the limited issue of the H&F Principals' qualifications.[13/]

13/ See Section 309(e) of the Communications Act of 1934, as amended (requiring a hearing only in cases involving a substantial and material question of fact). See also United States v. FCC, 652 F.2d 72, 95-96 (D.C. Cir. 1980) (refusing to require Commission to hold an evidentiary hearing with respect to satellite applications because a hearing "would not aid in, nor change, the result," and could cause damaging delay) (internal quotations and citation omitted); Washington Ass'n for Television & Children v. FCC, 665 F.2d 1264, 1270 (D.C. Cir. 1981) (upholding the Commission's refusal to hold a hearing where there "were no significant factual issues in dispute" and there "was nothing to be gained from holding formal hearings"); National Ass'n for Better Broadcasting v. FCC, 591 F.2d 812, 815 (D.C. Cir. 1978) (refusing to require hearing "where the facts are undisputed, and the disposition of an appellant's claims [turns] not on determination of facts but inferences to

(continued...)

Of course, the H&F Principals are cognizant of the fact that the MobileMedia hearing itself has been stayed, not terminated, and there may be a remote, theoretical chance that a hearing would be held for some currently unforeseen reason. In that unlikely event, the H&F Principals recognize that the currently requested finding of basic fitness would not insulate them from the consequences of any new facts that were to emerge at such a hearing. In other words, it is entirely appropriate for the Commission to find the H&F Principals fully qualified now, without prejudice to the Commission's right to revisit that conclusion should newly discovered facts so warrant.

[13/](...continued)
be drawn from those facts") (citations and internal quotations omitted) (alteration in original); Gencom Inc. v. FCC, 832 F.2d 171, 182-83 (D.C. Cir. 1987) (upholding FCC decision to dismiss misrepresentation allegations without a hearing).